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Nos. 07-21 and 07-251

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *et al.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *et al.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

TODD ROKITA, INDIANA SECRETARY OF STATE, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE AND BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER STATE SECRETARIES OF STATE IN SUPPORT OF PETITIONERS

[ELECTION OFFICIALS' EXPERIENCE]

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AFTER THE FILING DEADLINE

Pursuant to Supreme Court Rules 30.4 and 37.3, the Hon. Cathy Cox, Secretary of State of the State of Georgia, 1999 to 2007, and Assistant Secretary of State, 1996 to 1999; the Hon. John T. Willis, Secretary of State of the State of Maryland, 1995 to 2003; the Hon. Robin Carnahan, Secretary of State of the State of Missouri, 2005 to present; the Hon. Jennifer L. Brunner, Secretary of State of the State of Ohio since January 8, 2007; and the Hon. Deborah L. Markowitz, Secretary of State of the State of Vermont, 1999 to present, respectfully move the Court for leave to file the brief that follows after the deadline for filing an *amicus curiae* brief supporting Petitioners (November 13, 2007, at 2 p.m.).

Amici apologize for the late brief. The attached brief was filed with the Court and served on the parties electronically at 1:14 p.m. on November 13, 2007, but was not received by the Court or the parties in hard-copy form until the next morning via Federal Express.

Petitioners and Respondent Marion County Election Board consent, and the State Respondents do not object, to this request. Moreover, since the parties received timely electronic service of the brief, the granting of this motion would not prejudice them.

Respectfully submitted,

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On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER STATE SECRETARIES OF STATE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI[1]

This brief is respectfully submitted by the Hon. Cathy Cox, Secretary of State of the State of Georgia,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

1999 to 2007, and Assistant Secretary of State, 1996 to 1999; the Hon. John T. Willis, Secretary of State of the State of Maryland, 1995 to 2003; the Hon. Robin Carnahan, Secretary of State of the State of Missouri, 2005 to present; the Hon. Jennifer L. Brunner, Secretary of State of the State of Ohio since January 8, 2007; and the Hon. Deborah L. Markowitz, Secretary of State of the State of Vermont, 1999 to present. Together, *amici* have more than thirty years of experience implementing state and federal election laws or overseeing elections within their respective jurisdictions.

As officials responsible for overseeing elections under a variety of voter identification laws, *amici* have special insight into the issues raised by these cases. Their experience shows that there is virtually no evidence of polling place voter impersonation fraud,[2] the stated reason for enactment of the Indiana law at issue here; that laws like Indiana's will effectively disenfranchise many eligible voters, particularly minorities, women, the elderly, the disabled, and the poor, while doing nothing to prevent polling place voter impersonation fraud; and that in their States and throughout the country, honest elections, free of polling place voter impersonation fraud, are held without onerous photo identification requirements of the type imposed by the State of Indiana.

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[2] Throughout this brief "polling place voter impersonation fraud" refers to an individual attempting to vote at the polling place in the name of another.

Amici have a strong interest in preserving and defending the integrity, fairness, and openness of the electoral process that lies at the core of our democratic system of government, the legitimacy of which depends on ensuring that all eligible citizens are able to exercise the right to vote. They are concerned that the Court's resolution of the issues in the instant cases will have a profound effect on election administration laws and future legislation in States beyond Indiana. They ask the Court to reaffirm the principle that the fundamental right to vote shall not be burdened unnecessarily to remedy an essentially non-existent problem.

SUMMARY OF ARGUMENT

The right of each eligible citizen to vote in free and open elections is fundamental to government by the people. The Indiana law at issue here ostensibly seeks to advance the State's interest in free and open elections by using voter identification requirements to prevent polling place voter impersonation fraud, a type of voting fraud of which *amici* have seen no evidence. Despite the State's considerable police powers, laws like Indiana's place the burden of preventing voter impersonation on the individual voter. The Indiana statute mandates that each voter prove his or her identity with a limited range of government-issued photo identification, even where there is no basis to question the voter's eligibility or identity, or to suspect that the voter is attempting to impersonate another, and even where election officials have adequate alternative means of identifying the voter. The limited range of identification that is acceptable under laws like

Indiana's may be obtained only through the voter's expenditure of time and money to obtain underlying documents, such as a certified birth certificate or proof of change of name. Laws like Indiana's thus severely burden the right to vote and impermissibly and unnecessarily condition the exercise of that right on the voter's disbursement of funds and ability to overcome substantial bureaucratic requirements. In the *amici*'s experience, such restrictions will prevent hundreds of thousands of citizens from exercising their fundamental right to vote, especially poor, minority, elderly, disabled, and female voters.

The experience of other States, including those in which *amici* have served, shows that States can conduct elections free of polling place voter impersonation fraud without imposing restrictions, like those in Indiana, that imperil the right of eligible citizens to vote. Further, *amici* submit that elections cannot be fair if eligible voters are prevented from voting.

ARGUMENT

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court held that, in determining the constitutionality of a state law affecting the right to vote, it is proper to weigh the burden imposed on that right against the interests served by the law. *Id.* at 434. In undertaking this balancing test, the Court is to consider "'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Based on their experience overseeing state election laws,[3] *amici* submit that the court of appeals misjudged the burdens imposed and the interests served by laws like Indiana's. The Seventh Circuit accepted the premise of Indiana's voter identification law—that the statute was necessary to combat and prevent polling place voter impersonation fraud—and emphasized that, in applying the *Burdick* balancing test, "the right to vote is on both sides of the ledger." *Crawford v. Marion County Election*

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[3] Beyond their service within their respective States, *amici* have additional experience relevant to the issues in these cases. By virtue of their affiliation with and work for the National Association of Secretaries of State ("NASS"), all of the *amici* are familiar with the election laws of other States. For example, Secretary Markowitz is the immediate past president of NASS, and Secretaries Brunner, Carnahan, and Markowitz are all members of NASS's Standing Committee on Elections, of which Secretary Carnahan is co-chair, and its Standing Committee on Voter Participation. Secretary Carnahan also serves on the Election Assistance Commission's Board of Advisors. Secretary Willis has served as a regional vice president of NASS and as vice chairman of NASS's Elections and Voter Participation Committee and Election Reform Task Force. Secretary Willis also chaired Maryland's Special Committee on Voting Systems and Election Procedures, which led to landmark legislation and implementation of state election reform measures in 2001. He has also developed and manages a program through which he has trained nearly 8,000 election judges (Maryland's name for poll workers) in Baltimore City and Baltimore County. Secretary Cox previously chaired NASS's Standing Committee on Elections, and has taught election law at the University of Georgia School of Law. Secretary Brunner served in Ohio as a member of the Franklin County Board of Elections, as a common pleas judge, as legislative counsel in the office of the Ohio secretary of state, and as a private practitioner of election law.

Bd., 472 F.3d 949, 952 (7th Cir. 2007). Yet, the court failed to take due account of the fact that there is little or no evidence in Indiana or in other States that polling place voter impersonation fraud occurs at all, much less that preventing this type of voting fraud is a compelling state interest. *Id.* at 952-54. Evidence also shows that many voters would be prevented or deterred from voting because of the burdens imposed by restrictive photo identification requirements like Indiana's. *Id.* at 951-52.

As set forth below, the specter of polling place voter impersonation fraud cannot justify the very real burdens imposed on eligible voters by photo identification requirements. Laws like Indiana's that place the burden of preventing fraud on voters lacking specific forms of photo identification—even when there is no reason to question their identity, and when their identity can be established through less burdensome means—are unacceptable. Because requirements like those imposed by the Indiana voter identification statute place burdens on the fundamental right to vote that far outweigh the interests of the State, the judgment of the court of appeals should be reversed.

I. RESTRICTIVE VOTER ID LAWS LIKE INDIANA'S WOULD IMPOSE AN UNDUE BURDEN ON MANY VOTERS' EXERCISE OF THE FUNDAMENTAL RIGHT TO VOTE

The experience of *amici* as the chief election officers in their respective states[4]—and in particular

[4] Although the Maryland Secretary of State is not the chief election official under the laws of that State, the office has

the experience of *amici* in Missouri and Georgia, two States that enacted voter photo identification statutes similar to the one at issue here—demonstrates that laws like Indiana's strike an impermissible balance between their purported goal of combating voting fraud and the burdens they place on their citizens' fundamental right to vote.

A. As Little or No Evidence of Polling Place Voter Impersonation Fraud Exists, It Does Not Justify the Burdens Imposed by Restrictive Voter ID Laws

In the experience of *amici*, there is little or no evidence that polling place voter impersonation fraud exists. If it exists at all, it is extremely rare, and does not justify the burdens imposed by laws like Indiana's. In overseeing election laws, *amici* provide access to training for local election officials, maintain and administer the centralized voter registration list to be used by local election authorities, and refer any instances of alleged fraudulent voting to the appropriate prosecutorial authorities. *See, e.g.*, GA. CODE ANN. §§ 21-2-30 to -31; OHIO REV. CODE ANN. § 3501.05; MO. REV. STAT. § 115.158; VT. STAT. ANN.

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a substantial role in the election process, including receipt of referendum petitions, drafting of ballot questions, presidential primary candidate selection, and membership on the Board of State Canvassers. *See* MD. CONST. art. XVI, § 3(b); MD. CODE ANN., ELEC. LAW §§ 6-205, 7-103, 8-502, 11-501 to -503. Moreover, with respect to election administration, laws, and procedures, Secretary Willis has been active at the local, state, and national levels for more than thirty years as an academic, lawyer, practitioner, and government official.

tit. 17 § 2154. During their tenures as secretaries of state, *amici* collectively administered or oversaw federal elections between 1996 and the present in which more than twenty-four million votes were cast, and *amici* are not aware of *any* cases of polling place voter impersonation fraud in those elections. There have been isolated reports of polling place voter impersonation fraud, but investigation of such reports has regularly shown them to be unsupported or has resulted in a decision not to prosecute, usually because the purported impersonation was either a mistake or arose from some other cause thought not to merit prosecution.[5] Instead, most of the few credible reports of voting fraud relate to fraud in voter registration or absentee voting, types of voting fraud that statutes like the Indiana law at issue would do nothing to prevent.

In Missouri, there have been no reported cases of polling place voter impersonation fraud during Secretary Carnahan's tenure or that of her predecessor, Secretary (now Governor) Matt Blunt.[6]

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[5] For example, in one case in Vermont known to Secretary Markowitz, a son attempted to vote for his father, with his father's permission, but a poll worker prevented him from doing so. Therefore, photo identification was not needed to prevent the son from voting in a name other than his own.

[6] In 2006 litigation over a subsequently invalidated voter identification statute, four long-serving local election officials and the co-director of elections for the secretary of state's office presented evidence that voter impersonation was not an issue in Missouri, and that photo identification requirements would, in any case, do nothing to prevent the most prevalent types of voting fraud alleged in the State. *See Weinschenk v. State*, 203 S.W.3d 201, 209-10 (Mo. 2006).

See, e.g., Robin Carnahan, Secretary of State, *Voters First: An Examination of the 2006 Midterm Election in Missouri* 5 (2007), *available at* http://www.sos.mo.gov/elections/VotersFirst/VotersFirst-FINAL.pdf ("As in previous elections, the absence of reports of voting impersonation or voting fraud in the 2006 election in Missouri was notable."). Moreover, then-Secretary Blunt stated publicly that statewide elections in 2002 and 2004 were "fraud-free" and "were two of the cleanest and problem-free elections in recent history." *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. 2006).

Despite the absence of evidence of polling place voter impersonation fraud in Missouri elections, the court of appeals stated that "[s]ome voter impersonation has been found . . . in the states that have been studied . . . includ[ing] . . . Missouri." *Crawford*, 472 F.3d at 953. In addition, in the courts below and in their opposition to the petitions for certiorari, Respondents have relied upon a report by Secretary Blunt that they claim documents voting fraud during the 2000 election in Missouri. *See Ind. Dem. Party v. Rokita*, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2006); Brief of Respondents in Opposition at 3. In fact, upon investigation, the U.S. Department of Justice concluded that Secretary Blunt's report was inaccurate. It found no evidence of voting fraud and instead found that tens of thousands of eligible voters had been disenfranchised because they had been improperly removed from the voter registration lists. *See* Stipulation of Facts and Consent Order, *United States v. St. Louis Bd. of Election Comm'rs*, No. 02-cv-1235 (E.D. Mo. Aug. 14, 2002), *available at* http://www.usdoj.gov/crt/voting/nvra/stlouis_cd.pdf.

Similarly, in Georgia, though there have been allegations of polling place voter impersonation fraud in the form of ballots cast by deceased voters, every one of these claims has been proven unfounded upon investigation. During her tenure, Secretary Cox's office investigated claims of polling place voter impersonation fraud and found that none were supported by the evidence. As a result, no prosecutions resulted under either state or federal law.

A report by advocacy groups examining two recent elections in Ohio concluded that only *four* votes of the more than *nine million cast* in Ohio's 2002 and 2004 general elections were deemed "ineligible or 'fraudulent'" and merited prosecution. *See* Coalition on Homelessness and Housing in Ohio & League of Women Voters of Ohio, *Let the People Vote: A Joint Report on Election Reform Activities in Ohio* 2 (June 14, 2005), *available at* http://www.cohhio.org/pdf/COH_Election_Reform_Report.pdf [hereinafter *Ohio Report*].

Likewise, in Vermont and Maryland, there has been little or no evidence of polling place voter impersonation fraud during the tenure of any *amicus* or since.

B. Restrictive Voter ID Laws Would Burden Significant Numbers of Eligible Voters

As discussed in Petitioners' briefs, elderly, poor, and minority voters are much less likely to possess the photo identification necessary to vote or the

underlying documentation required to obtain such identification. Brief of Petitioner Indiana Democratic Party at 12, 16-17; Brief of Petitioner Crawford at 13. That is consistent with the experience of *amici* in Georgia and Missouri, where statutes similar to the one enacted in Indiana were challenged in the courts. Evidence submitted in those cases established that between four and six percent of registered voters in Missouri, or approximately 169,215 to 240,000 registered voters, and more than four percent of registered voters in Georgia, or approximately 198,000 registered voters, lacked the type of photo identification required by such statutes. *Weinschenk*, 203 S.W.3d at 206; *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1362 (N.D. Ga. 2007) ("*Common Cause III*"). Similarly, in Ohio, one report estimated that approximately 357,000 citizens over the age of eighteen lacked either a driver's license or a state identification card. *See Ohio Report*, *supra*, at 5.

In the experience of *amici*, elderly, poor, and minority voters are less likely to have the required photo identification. *See, e.g.*, M.V. Hood III & Charles S. Bullock III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute* 19 (2007), *available at* http://www.vote.caltech.edu/VoterID/GAVoterID(Bullock-Hood).pdf. Both poor and disabled voters often do not own a car and so lack a driver's license; similarly, poor voters are less likely to have a passport. Female voters face additional obstacles in obtaining photo identification because their surnames often change upon marriage and no longer match the name on necessary

underlying documents, such as birth certificates. *See, e.g., Weinschenk*, 203 S.W.3d at 208.

The experiences of the named plaintiffs in the Missouri case illustrate the impact that photo identification laws have on otherwise eligible voters who, due to age or disability, struggle to obtain acceptable photo identification. These voters include Kathleen Weinschenk, who was born in Arkansas and has cerebral palsy; William Kottmeyer, who has limited mobility and had difficulty gathering the necessary documents and standing in line to obtain his identification; and Robert Pund, who has a physical condition that inhibits his mobility. *Id.* at 209. In addition, the experience of U.S. Congressman Ike Skelton of Missouri demonstrates the burden imposed by restricting the forms of identification voters can use to prove their identity. Congressman Skelton has never had a driver's license because, due to a physical disability, he cannot drive. Local officials, despite recognizing Congressman Skelton, told him that his Congressional identification card was not acceptable as one of the underlying documents required to obtain a non-driver's license, and that they therefore could not issue him the photo identification he needed to vote. Nicole Gaouette, *House Takes Up Voter IDs*, L.A. TIMES, Sep. 20, 2006, at A1.

Also, during argument before the Missouri Supreme Court, Senior Judge Charles Blackmar asked whether he would be able to vote with his expired driver's license. Judge Blackmar, 84 years old at the time, had allowed his license to expire because he no longer drove. Judge Blackmar was

told that, under Missouri law, he would only be able to cast a provisional ballot because he was born before 1941. However, people in his situation born in 1941 or later would not be allowed to vote. *See* Tim Hoover, *Voter ID, Tax Cases Argued*, KAN. CITY STAR, Oct. 5, 2006, at B1; *see also* MO. REV. STAT. § 115.427(3).

1. The courts below underestimated the burdens imposed by restrictive voter ID laws.

The courts below concluded that only a "few" eligible voters would be adversely affected by the Indiana law. *Crawford*, 472 F.3d at 952; *Ind. Dem. Party*, 458 F. Supp. 2d at 823. That conclusion is not consistent with the experience of *amici* in Georgia and Missouri, where it was estimated that hundreds of thousands of eligible voters do not have the government-issued photo identification required by laws similar to Indiana's. The experience of *amici* in their States suggests that, in fact, a large number of voters would be deterred by such a law—many more than the putative number of "impersonators" whom the statute might prevent from fraudulently voting. Further, the unsupported assumption of the court of appeals that the "vast majority of adults have [photo] identification," *Crawford*, 472 F.3d at 951, does not justify burdening voters who lack acceptable identification, any more than a poll tax could be justified because *most* citizens could pay it.

In reaching their conclusions, the courts below mistakenly relied upon a postcard survey of poll workers conducted by the Indiana Democratic Party.

The survey identified a number of voters who lacked the required government-issued photo identification, but the court observed that each such voter was over the age of sixty-five and therefore eligible to vote by absentee ballot. From that, the district court concluded that "the lack of evidence confirms that [the Indiana statute] is narrowly tailored because *every* hypothetical individual who Plaintiffs assert would be adversely affected by the law actually benefits from one of its exceptions." *Ind. Dem. Party*, 458 F. Supp. 2d at 823 (emphasis added). The court's reasoning is unsound because, as reflected in the experience of *amici*, poll workers tend to be much older than the average voter,[7] and the survey is thus unrepresentative of the voting population. It does not demonstrate that all persons without photo identification are over the age of sixty-five and so could vote by absentee ballot.

Furthermore, voting by absentee ballot imposes its own burdens, particularly for older voters who have long sought to perform their patriotic duty by voting in person. Under laws like Indiana's, only those older voters who have acceptable photo identification could continue to vote in person; those lacking such identification would be unable to cast

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[7] In Indiana, and nationwide, the average poll worker is reported to be 72 years old. *See* Tim Koponen, *Poll Worker Shortages: Could Students Be the Solution?*, *available at* http://www.in.gov/sos/elections/hava/pdf/HSHD_LTE.pdf (last visited Nov. 12, 2007); U.S. Election Assistance Comm'n, *Background on the Help America Vote College Poll Worker Program*, *available at* http://www.eac.gov/voter/poll%20workers/background (last visited Nov. 12, 2007).

their votes in person, and instead would be required to overcome substantial bureaucratic requirements in order to vote by absentee ballot. In addition, even though all Georgia voters may now cast absentee ballots, Secretary Cox is aware of one older voter who came to the polls in a recent municipal election but left without voting. Even though the poll workers knew the voter personally, the voter lacked the identification needed to cast a regular ballot at the polls and could not obtain it in time to have a provisional ballot counted. Other older voters also left without voting because they did not bring acceptable identification with them and doubted that they could find it at home in time to return to the polls or to the local election office.

2. Missouri's and Georgia's voter ID statutes imposed significant burdens on the right to vote.

Prior to 2006, Missouri allowed voters to identify themselves through a variety of means, including a current utility bill, a bank statement, a Missouri college or university identification card, or any government document that contained the name and address of the voter. MO. REV. STAT. § 115.427 (2002) (amended 2006). A voter who did not have any of these forms of identification could still cast a regular ballot if two supervising election judges, one from each major political party, attested that they could personally identify the voter. *Id.* Since, according to election officials on both sides of the aisle, there was no evidence of polling place voter impersonation fraud in any of the 2002, 2004, or 2006 elections, these voter identification requirements were

sufficient to help ensure fair elections in Missouri. *See supra* Section I.A.

In 2006, the Missouri legislature passed a law, very similar to the Indiana statute at issue here, requiring voters to present non-expired or non-expiring government-issued photo identification in order to cast a regular ballot. *See* MO. REV. STAT. § 115.427. Under the new law, voters lacking acceptable identification had to present at least three different types of underlying documentation before they could obtain photo identification.[8] In each such instance, to obtain the necessary identification, an eligible voter would be required to present either a certified birth certificate or a U.S. passport.[9]

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[8] To obtain photo identification, Missouri citizens must provide "Proof of Lawful Presence," which typically means a certified copy of the voter's birth certificate, at a cost of $5 to $30 and a wait of as long as ten weeks; "Proof of Lawful Identity," most commonly a Social Security card; and "Proof of Residency," which can be a utility bill or government check showing the voter's address. *See Weinschenk*, 203 S.W.3d at 207-08; *Weinschenk v. State*, Nos. 06AC-CC00656, 06AC-CC00587, slip op. at 5-8 (Cir. Ct., Cole County Sep. 14, 2006); *see also* Nat'l Ctr. Health Stat., *Where to Write for Vital Records* (updated Oct. 19, 2007), *available at* http://www.cdc.gov/nchs/data/misc/10-19-07.w2w.pdf (providing information on how to obtain birth certificates in the various States). Additional certified documents—including marriage licenses, divorce decrees, court orders, adoption papers, and amended birth certificates—are necessary for individuals whose names have changed. *Weinschenk*, 203 S.W.3d at 208.

[9] Obtaining a passport itself requires presentation of a certified birth certificate or acceptable substitute documentation, which may be similarly difficult to acquire. *See* U.S. Dep't of State, *How To Apply in Person for a Passport*,

Acquiring either document involves overcoming substantial bureaucratic requirements and paying a fee. Those voters unable to obtain acceptable identification were unable to cast regular ballots, and could only in limited circumstances cast provisional ballots. *Id.* § 115.427(3).

The Missouri statute was challenged by a group of affected voters, who argued, *inter alia*, that the statute imposed an impermissible burden on the fundamental right to vote and that the costs associated with obtaining acceptable identification constituted a poll tax. Evidence presented to the Court demonstrated that there were approximately 169,215 to 240,000 registered voters who did not possess the photo identification required to cast a regular ballot. *Weinschenk*, 203 S.W.3d at 206. In addition, several plaintiffs testified that they did not have the underlying documents necessary to obtain photo identification. *Id.* at 208-09. For example, plaintiff Maudie Mae Hughes testified that, despite several attempts to obtain a birth certificate, her birth state of Mississippi had informed her on multiple occasions that it had no record of her birth. *Id.* at 209.

The Missouri Supreme Court found that the photo identification requirement imposed a heavy burden on the right to vote and was not narrowly tailored to meet a compelling state interest. *Id.* at 221-22. Based on that finding, it affirmed the lower court's holding that the law violated the Missouri State

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http://travel.state.gov/passport/get/first/first_830.html (last visited Nov. 12, 2007).

Constitution's guarantees of equal protection and the right to vote. *Id.*

In Georgia, before 2005, voters could present any one of seventeen acceptable forms of identification, including non-photo identification such as a Social Security card, current utility bill, or a bank statement showing the voter's name and address.[10] GA. CODE ANN. § 21-2-417(a) (2004) (amended 2006). A voter lacking such identification was entitled to cast a regular ballot simply by signing an affidavit swearing that he or she was the person identified on the elector's certificate. *Id.* § 21-2-417(b) (2004) (amended 2006). Election officials could then compare the signature on the affidavit to that on file. As in Missouri, Georgia's pre-2005 voter identification requirements were sufficient to help ensure fair elections.

In 2005, the Georgia legislature enacted a statute, similar to Indiana's, requiring voters to present government-issued photo identification before they could cast a regular ballot. *See id.* § 21-2-417 (2005) (amended 2006). Voters lacking acceptable identification could no longer simply sign an affidavit of identity and cast a regular ballot; instead, they would have to cast provisional ballots, which only would be counted if they presented acceptable identification to the registrar within forty-eight

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[10] These seventeen forms of identification were selected because each would have required a voter to have appeared in person before some third party to obtain that document. In the experience of Secretary Cox, this was an effective means of preventing in-person voting fraud.

hours. *Id.* §§ 21-2-417(b) (2005) (amended 2006); 21-2-418; 21-2-419; *see infra* Section I.B.3 (discussing the fact that voters casting provisional ballots in Georgia often did not return in time with the necessary photo identification to have them counted).

Under the 2005 law, a Georgia voter seeking to obtain acceptable identification would need to pay a fee, provide various proofs of identification (including a birth certificate or U.S. passport), and visit the Department of Driver Services ("DDS"), for which there were only fifty-six full-time and two part-time customer service centers in Georgia's 159 counties. *See Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1334-35, 1340 (N.D. Ga. 2005) ("*Common Cause I*"). The law allowed for waiver of the fee for obtaining photo identification from DDS but did not waive any of the fees associated with obtaining other underlying documentation, such as a birth certificate, necessary to acquire photo identification. Additionally, the law required an applicant for the fee waiver to execute a sworn affidavit of indigence, an exercise found to be a burden and one many eligible voters would be embarrassed to undertake. *Id.* at 1363-64 (discussing GA. CODE ANN. § 40-5-103 (2005) (amended 2006)).

In litigation over the 2005 law, plaintiffs demonstrated that numerous registered voters in Georgia lacked any of the required forms of photo identification, and that many of these voters would face significant difficulties in obtaining such identification. *Id.* at 1338-42. Some eligible Georgia voters testified that they were unable to travel to a DDS office to apply for a photo identification card,

could not afford the fee, or possessed disabilities that would make it very difficult for them to follow the bureaucratic procedures for obtaining such a card. *Id.* at 1340-41. Other voters did not possess and could not procure necessary underlying documents, such as birth certificates or valid out-of-state driver's licenses, making it impossible for them to obtain a photo identification card. *Id.* at 1341-42. The court found that the 2005 photo identification requirement placed "severe" restrictions on the right to vote, *id.* at 1365, and that obtaining the necessary photo identification would require the expenditure of funds and a significant investment of time and effort to overcome the substantial bureaucratic requirements involved. *Id.* at 1359-70.[11]

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[11] After the court enjoined enforcement of the 2005 statute, the Georgia legislature attempted to retain the photo identification requirement by amending the law rather than returning to the pre-2005 statute. The amended statute provided for a slightly broader array of underlying documentation, including non-photo identification, to obtain, at no cost, a voter identification card. *See* GA. CODE ANN. § 21-2-417.1; GA. COMP. R. & REGS. 183-1-20.01 (2006); *see also Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1306-11, 1351-52 (N.D. Ga. 2006) ("*Common Cause II*"). Although the amended statute permits all voters to cast absentee ballots during the week immediately preceding an election, GA. CODE ANN. § 21-2-380(b), many counties have interpreted the statute as requiring photo identification for such early voting.

The court recently lifted its injunction against the amended statute, *Common Cause III*, 504 F. Supp. 2d at 1383. That decision has been appealed on the grounds that the 2006 amendments did not cure the law's constitutional deficiencies, because it still disenfranchises thousands of eligible voters who do not have or cannot obtain the necessary identification. *See*

3. Indiana's voter ID statute.

As described in Petitioners' briefs, *see* Brief of Petitioner Indiana Democratic Party at 10-20; Brief of Petitioner Crawford at 8-21, the Indiana law imposes burdens similar to those of the Georgia and Missouri statutes that were challenged on constitutional grounds. For example, obtaining acceptable identification under the Indiana statute requires several different forms of underlying identification, including a birth certificate. In the experience of *amici*, this will have a significant impact on the ability of minorities, women, the disabled, the elderly, and the poor to exercise their fundamental right to vote. *See, e.g., Common Cause I*, 406 F. Supp. 2d at 1359-70; *Weinschenk*, 203 S.W.3d at 206-15.

Without the necessary documentation, Indiana voters—like those in States that have had similarly restrictive laws—can only cast a provisional ballot, which will not be counted unless the voter produces acceptable identification within a short period of time. In the experience of *amici*, casting a provisional ballot is no substitute for casting a regular ballot. The number of provisional ballots counted varies widely, but States, including Georgia, Missouri, and Indiana, often count fewer than half of them. *See* Kimball W. Brace, *Final Report of the 2004 Election Day Survey: Submitted to the U.S. Election Assistance Commission* ch. 6, 6-9 (2005), *available at* http://www.eac.gov/clearinghouse/

Common Cause/Ga. v. Billups, No. 07-14664-CC (11th Cir. docketed Oct. 5, 2007).

docs/eds2004/2004-election-day-survey-full-report/attachment_download/file. For instance, of the approximately 8,000 provisional ballots cast in Missouri in 2004, only 3,000 were counted. *Weinschenk*, 203 S.W.3d at 213 & n.18. During the same election, Indiana counted less than sixteen percent of the provisional ballots cast. Brace, *supra*, ch. 6, at 6-9. Recent experience in Georgia—one of the only States to hold elections, albeit on a local level, with a stringent photo identification statute in effect—further demonstrates the substantial burden such provisional voting requirements impose. For example, Secretary Cox reports that in special elections held on September 20, 2005, a low percentage of the provisional ballots cast were in fact counted because voters did not return to present acceptable photo identification within the time allowed. *See also Common Cause I*, 406 F. Supp. 2d at 1344. Voters compelled to vote provisionally were therefore more likely than not to be disenfranchised.

C. Restrictive Voter ID Laws Impose Significant Burdens on the Election System, Disadvantaging All Voters

Enforcement of restrictive voter identification laws like Indiana's would undoubtedly result in delays at the polls, as voters are challenged, their identification is checked, and those without acceptable identification are made to fill out provisional ballots. In the experience of *amici*, long lines at the polls reduce voter turnout and burden those who do vote. *See, e.g.*, Carnahan, *supra*, at 10-12 (quoting a poll worker as saying "[p]eople left because lines were too long," and a voter reporting

that, due to a forty-five minute wait, "[p]eople are leaving without voting"). Also, poll workers will need to be educated regarding the new photo identification requirement, and there is a substantial danger that the statute will not be applied consistently and uniformly. *Id.* at 12-13. States and local governments will also have to divert resources to address the educational and other costs of photo identification requirements,[12] reducing the funds available for voter registration and other election administration efforts. The Court should consider these secondary effects in determining whether a photo identification statute is, in fact, justified by the virtually non-existent threat of polling place voter impersonation fraud.

II. STATES CAN ENSURE THE INTEGRITY OF ELECTIONS WITHOUT BURDENSOME VOTER ID REQUIREMENTS

The availability of less restrictive measures is an important consideration in applying the *Burdick* test to determine the constitutionality of election laws. *See, e.g., Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 195-99 (1999) (concluding that there were existing provisions of Colorado law that provided less restrictive means of meeting the State's need to identify petition circulators). In the experience of *amici*, States have at their disposal several different

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[12] In January 2006, the Ohio legislature directed the Ohio Secretary of State and the Ohio Boards of Elections to undertake voter education concerning new voter identification requirements, but did not provide any additional funding. *See, e.g.*, OHIO REV. CODE ANN. §§ 3501.19, 3503.28.

methods of verifying voter identity that are as effective as, but much less burdensome than, laws like the Indiana statute at issue. Experience also shows that allowing voters to establish their identity, where necessary, through a variety of forms of photo and non-photo identification does not endanger the integrity of elections.

States have a number of significantly less burdensome, yet effective alternatives available to deter polling place voter impersonation fraud, such as less onerous voter identification requirements and criminal statutes penalizing voting fraud. The registration process itself serves to prevent polling place voter impersonation fraud by giving States an effective means of verifying the voter's identity. States could do this by comparing voters' signatures or other unique identifying information, such as their dates of birth or Social Security numbers, to that on file. Moreover, when given a variety of documents to choose from to prove their identity, or the opportunity to do so by some other means, such as attestation of personal knowledge by election judges, voters no longer bear the full burden of preventing fraud. Based on the experience of *amici*, it is clear that voter identification requirements like those enacted in Indiana do nothing to address the main types of voting fraud, and that less restrictive alternatives, including signature verification, are sufficient to achieve the goal of preventing polling place voter impersonation fraud.

In the experience of *amici* Cox and Willis, new technologies, such as electronic poll books, when properly deployed at polling places, may provide

another layer of protection. These devices—computers containing a complete voter registration list that create a record each time a voter signs in to vote—deter polling place voter impersonation fraud by creating an electronic record of every action taken with or by the voter.[13] Electronic poll books can also be programmed, or linked, to enable comparison of digitized copies of voter signatures from voter registration applications. In the experience of *amici*, such investments are more effective as security measures than onerous and costly voter identification requirements.

While *amici* are not aware of any evidence of significant polling place voter impersonation fraud prior to enactment of the Help America Vote Act of 2002, PUB. L. 107-252, 116 STAT. 1666 (2002) ("HAVA"), that law provides another method of voter identification that does not so severely burden voters' rights. Among other things, it requires States and local governments responsible for administering federal elections to verify the identities of voters who register by mail. This is most frequently accomplished during the registration process. Voters may submit with their registration forms their driver's license number or the last four digits of their

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[13] Different models of electronic poll book have different capabilities. For example, in Georgia and Maryland, these devices are networked within the polling place (such that a voter cannot check in with a different poll worker at the same site), but not between polling places. In the future, *amici* Cox and Willis expect that technological advances and increased resources will lead to real-time networking of all poll books within their States, providing yet another less burdensome safeguard against polling place voter impersonation fraud.

Social Security number, information which a state or local election official may then match with an existing state record bearing the same number and the voter's name and date of birth as listed on the registration form. 42 U.S.C. § 15483(b)(3)(B). Alternatively, if a voter lacks such information, he or she may submit with their voter registrations a copy of a current and valid photo identification, a copy of a current utility bill, bank statement, government check, paycheck, or any government document that shows the name and address of the voter. *Id.* § 15483(b)(3)(A).

If a voter registers by mail and fails to provide either verifying information or identification at the registration stage, HAVA provides that, in most instances, the voter must instead present identification the first time that he or she votes in person. *Id.* § 15483(b)(2)(A)(i).[14] HAVA does not—as does Indiana—limit the forms of possible identification to a select few. Instead, it allows voters to choose from among the same variety of photo and non-photo identification, many of which are available at no cost to the voter, accepted as proof of identity in the registration process. *Id.* An individual who cannot provide such identification may still cast a provisional ballot, which will be counted if state or local election officials determine that the voter is eligible to vote. *Id.* §§ 15482(a)(4), 15483(b)(2)(B). The percentage of provisional ballots

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[14] HAVA also requires first-time voters casting absentee ballots to submit identification with their ballots. 42 U.S.C. § 15483(b)(2)(A)(ii).

actually counted varies widely from state to state. *See supra* Section I.B.3.

In their capacities as Secretaries of State, all of the *amici* have worked to implement HAVA's mandates, and have seen little or no evidence of polling place voter impersonation fraud. Twenty-three States and the District of Columbia currently have only the minimum HAVA identification requirements. *See* Electionline.org, *Voter ID Laws*, *available at* http://electionline.org/Default.aspx?tabid=364 (last visited Nov. 12, 2007). *Amici* Willis and Markowitz serve or served in States that do not require more documentation than that required by HAVA. In Maryland, election judges verify voters' identities by asking them to provide their date of birth and address and to sign voting authority cards. MD. CODE ANN., ELEC. LAW § 10-310(a). Likewise, Vermont voters are required to identify themselves when they vote, but are not required to show documentary identification, except when required by HAVA. VT. STAT. ANN. tit. 17 § 2563.

In the experience of *amici* Willis and Markowitz, voter registration and the identification procedures used in their States are sufficient to verify the identities of voters casting their ballots at polling stations and to prevent polling place voter impersonation fraud. At the same time, because HAVA allows voters to establish their identities by presenting any one of a variety of forms of identification, many of which do not require voters to obtain underlying documents such as certified birth certificates, the burdens imposed on voters are far

less onerous than those imposed by laws like Indiana's.

HAVA permits States to impose stricter requirements so long as those requirements are not inconsistent with federal law, 42 U.S.C. § 15484, and a number of States have chosen to do so. Two States require all first-time voters, even if they have provided identification with their registration forms, to show some form of identification. KAN. STAT. ANN. § 25-2908(d); 25 PENN. STAT. § 3050. A larger number of other States require all voters, not just first-time voters, to provide identification. *See* ALA. CODE § 17-9-30; ALASKA STAT. § 15.15.225; ARIZ. REV. STAT. ANN. § 16-579; ARK. CODE ANN. § 7-5-305(a)(8); COLO. REV. STAT. §§ 1-1-104(19.5), 1-7-110; KY. REV. STAT. ANN. § 117.227; MONT. CODE. ANN. § 13-13-114; N.M. STAT. §§ 1-1-24, 1-12-7.1, 1-12-8; OHIO REV. CODE ANN. §§ 3503.16(B)(1), 3505.18; S.C. CODE ANN. § 7-13-710; TENN. CODE ANN. § 2-7-112; TEXAS ELEC. CODE §§ 63.001-63.009, 63.0101; WASH. REV. CODE § 29A.44.205. But, unlike Indiana, these "HAVA-plus" States do not restrict voters to government-issued photo identification. Rather, they allow voters to identify themselves through a variety of means that are often free and easily obtained—such as a utility bill, bank statement, government check, or Social Security card. With Missouri's restrictive voter identification statute having been found unconstitutional, that State has joined Ohio as a "HAVA-plus" state.

In the experience of *amici* Brunner and Carnahan, voters face much less of a burden when permitted to identify themselves through a variety of

means. Very few cases of polling place voter impersonation fraud have been reported in recent history, whether before or after the implementation of HAVA.

Several other States require voters to present some form of identification, but allow those without it to cast a regular vote upon signing an affidavit and, in some cases, providing additional identifying information. CONN. GEN. STAT. § 9-261; DEL. CODE ANN. tit. 15 § 4937; LA. REV. STAT. ANN. § 18:562; MICH. COMP. LAWS § 168.523(1); N.D. CENT. CODE § 16.1-05-07; S.D. CODIFIED LAWS §§ 12-18-6.1 to -6.2; VA. CODE ANN. § 24.2-643. Notably, in these States, eligible voters are not disenfranchised if they lack the requisite identification, and they are not forced to vote a provisional ballot, which will often not be counted. Unlike the Indiana, Georgia, and invalidated Missouri statutes, these laws provide voters with a last resort in the affidavit alternative, which can prevent disenfranchisement and provide a method for election officials to examine those affidavits and signatures for possible fraud.[15]

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[15] Two other States, Florida and Georgia, require voters to show photo identification in order to cast a regular, non-provisional ballot, but under slightly less restrictive terms than States like Indiana. Florida permits the use of many different forms of photo identification that are available to more people, including debit or credit cards and identification issued by employers, the military, schools, buyer's clubs, retirement centers, neighborhood associations, and public assistance agencies. FLA. STAT. § 101.043(1). See note 11, *supra*, for a discussion of Georgia law.

While many other States' identification requirements impose real burdens on voters, Indiana's statute is in an exclusive group—with only Georgia, since the Missouri law has been held unconstitutional—allowing only voters with one of a limited range of government-issued photo identification to cast regular ballots. Each of these forms of identification comes at a cost to the voter, and voters without identification are required, for their provisional ballots to be counted, to appear later with the identification that he or she failed to produce at the polling location. Yet, consistent with the experience of *amici* in their own States—including those with minimal identification requirements—there is little or no evidence that polling place voter impersonation fraud exists.

In states that have enacted laws imposing voter identification requirements as strict as those in Indiana, such as Georgia and Missouri, election officials have found that there were substantial burdens that fell on eligible voters, often disenfranchising them. For all those burdens, there was no countervailing benefit, as there was little or no evidence of polling place voter impersonation fraud before or after enactment of those laws.

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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